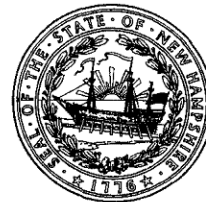




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

C&M Total Property Maintenance, Inc.
Attn: Charles Luca
P.O. Box 463
Center Conway, NH 03813

Re: Pequawket Pond, Conway, NH
Wetland File #2004-2259

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 04-097**

December 23, 2004

I. INTRODUCTION

This Notice of Proposed Administrative Fine is issued by the Department of Environmental Services, Water Division ("the Division") to C&M Total Property Maintenance, Inc., pursuant to RSA 483-B and Env-C 601. The Division is proposing that fines totaling \$10,000 be imposed against C&M Total Property Maintenance, Inc. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH 03302.
2. C&M Total Property Maintenance, Inc. ("C&M"). is a corporation registered to do business in New Hampshire having a mailing address of P.O. Box 463, Center Conway, NH 03813.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 483-B, the Comprehensive Shoreland Protection act ("CSPA"), the Department of Environmental Services ("DES") regulates development activities in the protected shoreland zone established under the CSPA. Pursuant to 483-B:17, the Commissioner of DES has adopted Env-Ws1400 to implement this program.
2. Pursuant to RSA 483-B:18, the Commissioner is authorized to impose fines of up to \$5,000 per violation for violations of the CSPA. Pursuant to RSA 483-B:17, the Commissioner has adopted Env-C 611 and certain provisions within Env-C 603 to establish the schedule of fines for such violations.
3. Pursuant to RSA 482-A, DES regulates dredging, filling, and construction in or on the bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
4. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.

5. RSA 483-B:9V(a)(2)(A) requires that, "Not more than a maximum of 50 percent of the basal area of trees, and a maximum of 50 percent of the total number of saplings shall be removed for any purpose within a 20-year period. A healthy, well-distributed stand of trees, saplings, shrubs and ground covers and their living, undamaged root systems shall be left in place."
6. RSA 483-B:9V(a)(2)(E) requires that, "Stumps and their root systems which are located within 50 feet of the reference line shall be left intact in the ground, unless removal is specifically approved by the department, pursuant to RSA 482-A."
7. RSA 483-B:9V(c)(1) requires that, "All new structures, modification to existing structures, and excavation or earth moving within the protected shoreland shall be designed and constructed in accordance with rules adopted by the department under 541-A, relative to terrain alteration under RSA 485-A:17, to manage stormwater and control erosion and sediment, during and after construction."
8. RSA 482-A:3, I, states that "no person shall excavate, remove, fill dredge or construct any structures in or on any bank, flat marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."
9. Mark Baer is the owner of a parcel of land with frontage on Pequawket Pond in Conway, NH, more particularly identified on Town of Conway Tax Map 277 as Lot 210 ("the Property"). Charles Luca is listed as the Principal of a business registered in New Hampshire as C&M Total Property Maintenance, Inc. C&M was contracted by Mark Baer to conduct work on his property.
10. On October 1, 2004, Division personnel inspected the property and observed the following:
 - a. Within an area measuring 33 linear feet along the shoreline, and extending 42 feet back from the reference line of Pequawket Pond, a well-distributed stand of trees, saplings, shrubs and groundcovers had not been left in place. No vegetation remained within this area.
 - b. At least 3 stumps and their root systems were removed within 50 feet of the Pequawket Pond reference line during the time between the inspection by Town of Conway officials, and the subsequent inspection by Division personnel.
 - c. Soils had been disturbed up to, and beyond the reference line of Pequawket Pond, without erosion and siltation controls in place to protect water quality.
 - d. The disturbance documented within the bank and in the lakebed of Pequawket Pond had been committed without a permit from the NHDES Wetlands Bureau.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. C&M violated RSA 483-B:9, V(a)(2)(A) by failing to maintain a healthy, well-distributed stand of trees, saplings, shrubs and ground covers within the 150 foot natural woodland buffer zone. For this violation this, Env-C 611.06 (c) specifies a fine amount of \$4,000.

2. C&M violated RSA 483-B:9, V(a)(2)(E) by removing at least 3 stumps and their root systems which were located within 50 feet of the reference line of a public water of the state. For this violation, Env-C 611.06 (b) specifies a fine amount of \$1,000 per stump. For the 3 violation noted above, the Division is seeking a fine of \$3,000.
3. C&M violated RSA 483-B:9, V(c)(1) by failing to install temporary erosion and siltation control measures prior to conducting excavation and earth moving activities. For this violation, Env-C 603.02(i)(1) specifies a fine amount of \$1,000
4. C&M violated RSA 482-A by conducting an unauthorized dredge in a public water. For this violation, Env-C 614.05 specifies a fine amount of \$2,000.

The total fine being sought is \$10,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, C&M is required to respond to this notice. Please respond no later than January 24, 2005 using the enclosed colored form.

1. If the C&M would like to have a hearing, please have an authorized representative sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.
2. If the C&M chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If the C&M wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate the C&M's interest in settling.

C&M is not required to be represented by an attorney. If C&M chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that the C&M committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that the C&M committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that C&M proves, by a preponderance of the evidence, applies in this case:**

1. If C&M would like to have a hearing, please have an authorized representative sign the appearance section of the colored form (upper portion) and return it to the DES Legal Unit, as noted on the form.
2. If C&M chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If C&M wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate C&M's interest in settling.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that C&M committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is C&M's opportunity to present testimony and evidence that C&M did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If C&M has any evidence, such as photographs, business records or other documents, that C&M believes show that C&M did not commit the violation(s) or that otherwise support C&M's position, the C&M should bring the evidence to the hearing. C&M may also bring witnesses (other people) to the hearing to testify on C&M's behalf.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If the C&M has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

~~**COPY**~~

Harry T. Stewart, P.E., Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Gretchen R. Hamel, Administrator, DES Legal Unit
Michael J. Wall, DES Assistant Commissioner
Harry T. Stewart, P.E., Director, Water Division
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Public Information Officer, DES PIP Office
Marjory Swope, NHACC
Conway Conservation Commission
Conway Board of Selectmen
Mark & Andrea Baer, Property Owners

***** RETURN THIS PAGE ONLY *****

**C&M TOTAL PROPERTY MAINTENANCE, INC. IS REQUIRED BY LAW
TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN January 24, 2005

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of C&M Total Property Maintenance, Inc.

_____ I request to have a **formal hearing** scheduled in this matter.

_____ I request to have a **prehearing conference** scheduled in this matter.

_____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of C&M Total Property Maintenance, Inc.

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$10,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

** If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:
Department of Environmental Services ~ Legal Unit
Attn: Michael Sclafani, Legal Assistant
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

ENVIRONMENTAL Fact Sheet



6 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.state.nh.us

CO-2

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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made**...the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact James Ballentine, Enforcement Paralegal, DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.